Supreme Court, U.S.
FILED
SEP 15 1989
JOSEPH F. SPANIOL
CLERK

No. 89-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KENNETH T. LYONS, and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,

Petitioners,

v.

RHODE ISLAND PUBLIC EMPLOYEES COUNCIL 94

and

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts of this case are relatively straightforward. In 1975 and 1976, three labor elections took place between, on one side, respondents American Federation of State, County, and Municipal Employees (hereinafter "AFSCME") and Rhode Island Public Employees Council 94 (hereinafter "Council 94") and, on the other side, petitioner National Association of Government Employees, Inc. (hereinafter "NAGE"). Respondents distributed campaign leaflets which consisted of an accurate reproduction of an October 31, 1972 column by investigative reporter Jack Anderson regarding two 1972 investigations

of NAGE's president, petitioner Kenneth T. Lyons. The correct date of the column was prominently displayed on the reprints.

The Jack Anderson column contained no false statements of fact when it was originally published in 1972. In addition to discussing investigations of Lyons by the Departments of Justice and Labor regarding alleged ties to organized crime and the misuse of union funds, the article stated that Lyons was "[o]ne of President Nixon's favorite labor leaders," and "national vice chairman of Democrats for Nixon." The column also discussed the up-coming 1972 presidential election in detail.

The Jack Anderson reprints distributed by respondents in 1975 and 1976 were full and accurate reproductions of the original column. In addition to the dating references within the text of the column, respondents typed the column's original publication date, "October 31, 1972," above the reprint in type larger than that of the column itself.[1] Prior to the distribution of the reprints, however, both federal investigations were concluded with no enforcement actions taken against Lyons. The reprints did not include these facts.

Petitioners brought a libel case based on the dissemination of the reprints which was first tried in 1983 in the Superior Court of Rhode Island.[2] The jury found in favor of all defendants, including respondents. Petitioners' new trial motion was denied by a successor judge after the trial judge died. The Rhode Island Supreme Court remanded the case for a second trial, however, because it found that the new trial motion required assessment of the credibility of the witnesses, which the suc-

[1] Some of the reprints also contained a large headline stating "EXPOSE/Jack Anderson Looks at NAGE," underlinings and one circle around a portion of the text, and a jagged line surrounding the entire article.

[2] Petitioners stipulated that they were "public figures."

cessor judge could not do. At the second trial in December 1987, the jury found respondents liable.[3]

On appeal, however, the Rhode Island Supreme Court reversed, finding that the Jack Anderson reprints contained no false statements of fact and had not been distributed with "actual malice." *Lyons v. Rhode Island Public Employees Council 94*, 559 A.2d 130 (R.I. 1989).[4] Specifically, the court relied on state law in finding that the Jack Anderson reprints did not contain false statements of fact because the references to "President Nixon" and the 1972 election dated the column, the reprints were affirmatively labelled with the original publication date, and the reprints had been distributed in the context of hotly contested labor elections. Additionally, the court independently reviewed the record and did not find clear and convincing evidence that the reprints were distributed with knowledge or reckless disregard of any falsity.

Petitioners now seek review in this Court. Despite petitioners' dramatic claim that the Rhode Island Supreme Court has "given birth to a startling and disquieting new First Amendment 'right'," Petition for Certiorari ("Petn.") at 11, the court below merely applied settled principles of libel law to the particular facts of this case. Respondents respectfully submit that the petition for certiorari should be denied.

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[3] A third defendant, AFSCME Local 911, was found not liable.

[4] Subsequent citations to the opinion below will refer to the pages of the opinion as it is reprinted in the appendix to the Petition, *i.e.*, "Petn. App. at A1."

REASONS FOR DENYING THE WRIT

I. The Rhode Island Supreme Court's Finding That the Anderson Reprint Contained No False Statement of Fact Was Based On the Application of Settled Principles of State Law.

The Rhode Island Supreme Court relied wholly on settled principles of state law in finding that the Jack Anderson reprints did not contain any false statement of fact, because a reasonable reader would understand the publication to be a dated, historical document, written at a particular point in the past and not implying any particular facts about the present:

> Reading these reprints in their historical context, noting the insertion of the October 31, 1972 date, and realizing that the reprints were republished during heated labor elections, we find that the jury is prevented from concluding that the article was false and defamatory. Therefore, we find that the EXPOSE and Anderson reprints did not contain a false and defamatory statement of fact.

Petn. App. at A11.

The court considered itself obligated to construe the reprint, as a whole, in the context in which it was published. As the text of the decision makes clear, these requirements were mandated by the court's previous decisions in *Della Posta v. Rand Express Freight Lines, Inc.*, 86 R.I. 148, 133 A.2d 775 (1957), and *Bray v. Providence Journal Co.*, 101 R.I. 111, 220 A.2d 531 (1966). Petn. App. at A8. The court also relied on the Rhode Island definition of "false" and "defamatory" words, citing its previous decision in this case, *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339 (R.I. 1986), as well as that decision's quotation from *Elias v. Youngken*, 493 A.2d 158 (R.I. 1985).

These cases repeat traditional and elementary rules of construction for determining whether a statement expresses or implies a falsehood.

> Words alleged to be defamatory must be read in the context of the publication in which they appear, taken as a whole.

Lyons, 516 A.2d at 1343. Thus, the court must consider the entirety of a publication, including its headline, *Bray*, 220 A.2d at 534-35, and must consider the context and reasonable meaning of the words, *Elias*, 493 A.2d at 161-63. These are not constitutional principles, but simple rules of state law which, as construed and applied by judges, control a jury's permissible interpretation of offending words. Moreover, these rules of construction are generally accepted and long-established. *See, e.g.*, Sack, *Libel, Slander, and Related Problems*, 51-55 (1980).

The Rhode Island Supreme Court never states that it was "constitutionally compelled," Petn. at 18, to find no falsity. In fact, its legal analysis is carefully constructed to indicate unmistakable reliance on state law. *See* Petn. App. at A8-A10. After reiterating the three elements required in an action in libel, citing only to its own decisions and to *Restatement (Second) of Torts* § 558 (1977), and discussing the definition of "false and defamatory" under Rhode Island common law, the court states the applicable rules of construction for applying this definition. This section of the opinion relies exclusively on previous decisions of the Rhode Island Supreme Court applying state common law.[5] The court's intention to base its "falsity" analysis exclusively on state law is then underlined by the immediately following discussion of the "actual malice" requirement which, by contrast,

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[5] The decision's only reference to federal concerns in its falsity analysis is its statement that "[t]he important constitutional concerns regarding free speech are greatest when a publication is political and is distributed during an election." Petn. App. at A11 (omitting citation to two decisions of this Court). The Rhode Island Supreme Court's opinion makes clear, however, that the court considered the political context of the speech because of the state law mandate "that we not isolate the words from the circumstances in which they were spoken." Petn. App. at A11.

relies extensively and explicitly on First Amendment principles. Petn. App. at A9-A10.[6]

II. The Rhode Island Supreme Court Decision Does Not Conflict with Other Precedents.

The Rhode Island Supreme Court did not in this case apply or create a radical new theory of "falsity" which is in conflict with other state courts or with its own earlier decisions. The court below has expressly recognized that a libel cause of action can be based on a false implication (by omission or otherwise) if the words, read in context, could be reasonably understood by the average person to state a defamatory falsehood. *See Healey v. New England Newspapers, Inc.*, 555 A.2d 321, 326 (R.I. 1989), *pet. for cert. pending*, No. 88-1939; *Lyons*, 516 A.2d at 1343. The present decision in no way repudiates the holding of only two months earlier in *Healey* that true facts could give rise to an actionably false implication. Rather, because of the factual context, the court found no such implication in this particular case.

Petitioners cannot demonstrate that the decision below has "given birth to a startling and disquieting new First Amendment 'right,' " Petn. at 11, so they attempt to show

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[6] In attempting to give weight to the allegation that constitutional issues lurk beneath the surface of the opinion, petitioners raise several transparently insubstantial issues, all of which fail to transform the Rhode Island definition of "falsity" into a matter of constitutional concern. Petitioners discuss both the republication rule, Petn. at 11-12, and the fair report privilege, Petn. at 12-13, despite the fact that these concepts are, as petitioners admit, merely "common-law concepts of truth and privilege," Petn. at 13, were not argued by the parties in the Rhode Island Supreme Court, and are not even alluded to by the opinion. Additionally, petitioners discuss the relevant common-law issues of falsity by omission, Petn. at 15-18, and falsity by implication, citing a variety of cases which primarily apply state common law. Petn. at 18-19. The Rhode Island Supreme Court, however, has neither eliminated nor narrowed these doctrines, on a constitutional or other basis. *See infra*, Section II.

that similar cases have come to opposite conclusions. Petitioners' argument, however, demonstrates only that different facts may produce different results.

Reilly v. Gillen, 176 N.J. Super. 321, 423 A.2d 311 (App. Div. 1980), cited by petitioners, is, for example, easily distinguishable. The New Jersey court found "false" a reprint which reported a charge of conspiracy against a city council candidate because the complaint was later dropped. The *Reilly* reprint, however, was 23 years old and the decision gives no indication that it was plainly dated. It contained substantive errors unrelated to the acquittal and was distributed only three days before the election. By contrast, the three-year-old Jack Anderson reprint was clearly dated in several ways and was published well in advance of election day of a heated campaign. Petn. App. at A11. Every other "false accusation" case cited by petitioners, Petn. at 16-18, is distinguishable on more general grounds.[7]

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[7] Particularly, they all deal with a contemporary report of a stale accusation or conviction with the suggestion (often through the omission of the relevant date) that the information is the most current (and, hence, most accurate) available. By contrast, the dated reprint of an old news item in the present case is presented as the opposite of up-to-date news—it clearly implies that subsequent events may have occurred. Respondents have a variety of other disagreements with the way petitioners summarize the holdings of other state precedents. *Barasch v. Soho Weekly News*, 208 N.J. Super. 163, 505 A.2d 166, 175 (App. Div. 1986) did not find falsity, but merely remanded for further findings. Moreover, the New Jersey court indicated that the reporting of a stale criminal accusation could be privileged unless reported "in some completely unrelated matter . . . before the public . . . ." The decision in *DiLorenzo v. New York Times, Inc.*, 81 A.D.2d 844, 432 N.Y.S.2d 483 (N.Y. App. Div. 1980), does not indicate that there was ever any conviction, making the report of conviction false on its face even without the omission of later acquittal. In *Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau of Maricopa County, Inc.*, 130 Ariz. 523, 637 P.2d 733 (1981), the court made no explicit finding of falsity, and may have been inclined to assume that readers of a Better Business Bureau publication would expect more (or more contemporary) accuracy.

Nor is the decision below at odds with *Lyons v. Policemen's Association of the District of Columbia, Inc.*, Civil Action No. 74-441, slip op. (D.D.C. Feb. 20, 1976). This 1976 decision of the United States District Court for the District of Columbia involved a republication of only part of the Jack Anderson reprint under wholly different circumstances. Petitioners themselves note that the portions of the article containing Mr. Lyons' denials of the charges were omitted. Petn. at 15 n.9. In fact, seven full paragraphs were omitted. Additionally, the reprint at issue in the D.C. case (1) was not distributed as part of a labor election campaign, (2) contained a headline composed not by Jack Anderson but by the republishers ("IBPO PRESIDENT INVESTIGATED FOR MISUSE OF UNION FUNDS AND PERJURY"), and (3) contained additional text added by the republishers stating that they did not "know of the final outcome of the investigation," a statement which under the circumstances was plainly false.[8] Thus, the decision below does not conflict with the common law or with any prior application of law to the Jack Anderson reprint.

III. There Is No Reason for This Court Again to Consider the Nature of the Independent Appellate Review Obligation in a Public Figure Libel Case.

Three months ago, the Court announced an opinion joined by eight Justices[9] in which it considered at length the manner in which a reviewing court in a public figure libel case must exercise its independent judgment to de-

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[8] Petitioners are additionally incorrect in asserting that the Rhode Island Supreme Court "reversed not only the verdict but its own prior ruling in this very case . . . ." Petn. at 3. The only ruling made by the court in *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339 (R.I. 1986), was that plaintiffs' new trial motion should be granted because the motion could not properly be decided by a judge who did not sit through the trial and, therefore, could not assess the credibility of the witnesses.

[9] Mr. Justice Scalia filed an opinion concurring in the judgment.

termine whether the record establishes actual malice with the convincing clarity required by the *New York Times Co. v. Sullivan*[10] line of cases. *Harte-Hanks Communications, Inc. v. Connaughton*, —— U.S. ——, 109 S. Ct. 257, 105 L.Ed.2d 562 (1989). The present case was decided approximately a month prior to the *Harte-Hanks* decision but is perfectly consistent with it. Indeed, it is significant that apart from a casual and perfunctory assertion that the decision below "is directly at odds with" *Harte-Hanks*, Petn. at 22, petitioners neither address *Harte-Hanks* nor articulate just why the Court should so soon *again* consider the standards for appellate review of a public figure libel case.

There is simply no need for the Court to revisit these issues until the lower courts have had time to consider and apply the *Harte-Hanks* rules. In this case, the Rhode Island Supreme Court followed the mandate of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1983), in a manner which anticipated this Court's decision in *Harte-Hanks*:

> In finding whether "clear and convincing" evidence of "actual malice" exists, we must independently examine the whole record. *New York Times Co. v. Sullivan*, 376 U.S. at 285, 84 S. Ct. at 729, 11 L. Ed. 2d at 709. The usual "clearly erroneous" standard of appellate review is not applicable, so we must examine mixed findings of fact and law to determine the issue of actual malice.

Petn. App. at A9-A10. In fulfilling this duty, the court reviewed testimony from the employees of respondents who actually disseminated the Jack Anderson reprints. Petn. App. at A12-A13. More importantly, however, the court determined that, under relevant state law principles of construction, the publication could not have been made with actual malice because it was not "false." *See supra*,

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[10] 376 U.S. 254 (1964).

Section I. This independent review is entirely unremarkable and presents no reason for further review by this Court.

IV. The Result Below Is Appropriately Protective of Vigorous and Heated Speech Uttered During a Hard Fought Labor Election Campaign.

As petitioners recognize, this case concerns a "literally accurate but incomplete" publication. Petn. at 13. The Jack Anderson reprint was circulated during a heated election contest between rival labor unions. This Court has frequently held that the First Amendment is particularly protective of political speech distributed during an election even when that speech is vituperative, exaggerated or hyperbolic. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Moreover, adversarial speech is given unusually wide tolerance in a labor union context:

> "It is a cliche by now but, nonetheless, an imbedded policy in labor relations that electioneering or campaigning has a broad tolerance. We do not encourage, *nor do we prohibit*, the exaggeration, the dissemination of half-truth or accusation. In sum, we leave it to the employee to decide."

Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 275 (1974) (quoting Naumoff, *Ground Rules for Recognition Under Executive Order 11491*, 22 Lab. L.J. 100 (1970) (emphasis added)).[11]

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[11] Robust and provocative speech is typical of labor union campaigns: "Federal labor policy encourages robust, even abusive, speech during labor conflicts," *Hob Nob Hill Restaurant v. Hotel and Restaurant Employees Union*, 660 F. Supp. 1266, 1269 (S.D. Cal. 1987), "most exaggerations and misstatements are left to be countered or corrected in the give and take of a robust campaign," *Melrose-Wakefield Hospital Ass'n v. NLRB*, 615 F.2d 563, 567 (1st Cir. 1980).

These policies underlie the fact that the alternative to the Rhode Island Supreme Court's holding is untenable. Had the court allowed petitioners to collect millions in damages for dissemination of the Jack Anderson reprint on the ground that it was misleading, incomplete or contained a "half truth," it would have imposed absurd and sterile limitations on political campaigns and labor disputes. The Jack Anderson column reprinted in the campaign leaflets was accurately dated and contained a great deal of information that was indisputably accurate and relevant to voters in the union elections: that petitioner Lyons was vice-chairman of Democrats for Nixon, that he had numerous Nixon connections, and that he had testified before the Senate about his contacts with a company with underworld connections.

The court wisely recognized that it could not require political candidates to publicize facts which benefit their opponent, to redact their campaign material, or to give a "balanced" accounting of their opponents' record. In this case in particular, the reprint was circulated long before the relevant elections and petitioners had every opportunity not only to attack the reprint as incomplete, unfair or misleading, but also actually to supply any omitted or updating information as part of the give-and-take of a free election.[12]

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[12] The Rhode Island Supreme Court also recognized that the participants in a labor election campaign are aware of the biased nature of the candidates' charges and countercharges. Thus the court noted that one voter in the election testified that "[j]ust because someone says something does not mean its true." Petn App. at A12. This acknowledgment of the public's expectations of labor campaigns was yet another application of the traditional standard adopted by the court: "what the person . . . to whom the communication was published reasonably understood as the meaning intended to be expressed." *Lyons*, 516 A.2d at 1343 (quoting *Restatement (Second) of Torts* § 563(e) (1977)).

CONCLUSION

For the above-stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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